

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Parts 2, 73, 74 and 90 of the)	
Commission's Rules to Permit)	ET Docket No. 03-158
New York Metropolitan Area)	MB Docket No. 03-159
Public Safety Agencies to Use)	
Frequencies at 482-488)	

**Reply Comments of the Police Department of the City of New York
and the New York Metropolitan Advisory Committee**

The Police Department of the City of New York (Department) and the New York Metropolitan Advisory Committee (NYMAC) submit these reply comments in response to the Commission's Notice of Proposed Rulemaking (NPRM) to reallocate TV broadcast channel 16 (482-488 MHz) in the New York metropolitan area to the land mobile service for public safety communications on a permanent basis.¹

The New York City Transit Authority, Motorola, Inc., the Association of Public Safety Communications Officials, International (APCO), the International Association of Police Chiefs, the Major Cities Chiefs Association, the National Public Safety Communications Council, the Public Safety Wireless Network Program, the Tri State Radio Planning Committee (800 MHz Regional Planning Update Committee) and the National League of Cities and United States Conference of Mayors filing jointly, submitted comments in support of the NPRM, as did the Department and NYMAC in their joint pleading. The Tribune Television Company ("Tribune") Mullaney

¹ In the Matter of Amendment of Parts 2, 73, 74 and 90 of the Commission's Rules to Permit New York Metropolitan Area Public Safety Agencies to Use Frequencies at 482-488, *Notice of Proposed Rulemaking*, ET Docket No. 03-158, MB Docket No. 03-159, FCC 03-165 (released July 10, 2003).

Engineering, Inc. (“Mullaney”) and K Licensee, Inc. (“K Licensee”) filed comments in opposition to the NPRM. . The Catholic Views Broadcasts, Inc., (“CVB”) filed Comments seeking more information. Set forth below is the Department’s and NYMAC’s Reply to these Comments.

The Mullaney Objection

Mullaney asserts² that there is no need to dedicate additional spectrum because of the allocations made to public safety in the Commission’s proceedings addressing the digital television transition.³ Mullaney also states that the Commission’s conditional waiver for public safety operations to use channel 16 in the New York Metropolitan area encumbered the Department and NYMAC to secondary status to broadcast interests. Mullaney “questions the tactics” of the Department and NYMAC in pursuing permanent authority and characterizes its technical methodology as a “flagrant abuse of the Commission (sic) process”. Mullaney also complains of the objections made by public safety agencies in the New York Metropolitan area to the displacement application of W11BJ to move from channel 11 to channel 16 in Hartford, Connecticut. Mullaney asserts that the parties in the W11BJ proceeding were not served with the Department’s submission to the Commission.⁴ Mullaney urges the Commission to designate one bureau to resolve all conflicts between broadcast and land mobile operations.

Mullaney’s contention that there is no need to allocate channel 16 to public safety communications in the New York Metropolitan area because of the 700 MHz allocation

² The Department and NYMAC have no objection to the Commission accepting Mullaney’s September 23, 2003 Comments.

³ In the Matter of Reallocation of Television Channels, 60-69, the 746-806 MHz Band, *Report and Order*, ET Docket No. 97-157 (released January 6, 1998).

⁴ Application for a Construction Permit to Change Channel 11 to Channel 16, BPTVL-19980601QZ, by Communications Site Management, LLC, Public Notice, June 11, 1998.

ignores the realities of the digital television transition and the demand for public safety communications in the New York Metropolitan area. There is no credible source that can state when the 700 MHz spectrum will be available to public safety communications. More importantly, Mullaney gives no recognition to the extreme conditions public safety faces and continued lack of access to usable spectrum

Mullaney's premise appears to relate to its involvement in support of W11BJ's displacement application to move from channel 11 to channel 16 in Hartford, Connecticut. The Nassau County Police Department, the Suffolk County Police Department, NYMAC and the Boston Fire Department filed objections to the application. Notably, in its response to these objections, W11BJ characterized the New York Metropolitan area public safety agencies concerns as "disingenuous". Mullaney's assertions here and in the W11BJ application that channel 16 operations are overall secondary to broadcast operations are not supported by any fair reading of the Commission's Order granting temporary authority that channel 16 operations. Pragmatically, land mobile operations at the levels used by the Department and NYMAC and broadcast operations at the same frequency cannot coexist so it is difficult to perceive how either service could be secondary to the other. Mullaney's view should be rejected.

Mullaney challenges the Department's methodology in its Technical Report that accompanied its submission.⁵ The Technical Analysis submitted to the Commission details the methodology used to analyze W11BJ's proposed operations. The Technical Analysis brings focus to the interference to land mobile *base stations*; it is at the base receiver where the interference challenge is most critical and not to the mobile

⁵ See Report of the Police Department of the City of New York , dated December 5, 2002 and contained in Commission Dockets 03-158 and 03-159

subscriber/user receiver. Mullaney makes no substantive response for the Commission to examine, and leaves technically unchallenged the Technical Analysis perspective with regard to W11BJ's negative impact on the channel 16 operations of the Suffolk County Police Department. Mullaney must do more than charge "flagrant abuse"; it must either present a technical analysis it believes appropriate or challenge that which the Department submitted. Mullaney does neither.⁶

Mullaney presents substantial reason in support of the Department and NYMAC's request in support of making channel 16 permanent. It demonstrates that there are interests asserting priority over channel 16 public safety operations and a commitment to pursue this position.

Comments of Tribune

Tribune is the licensee of WPHL-TV, channel 17 in Philadelphia, Pennsylvania. Tribune acknowledges that public safety communications operating on channel 16 in the New York Metropolitan area have met the requirements established in 47 CFR section 90.309(a) Table E. Tribune, however, opposes permanent authorization and recommends that the Commission terminate channel 16 public safety operations 90/180 days after completion of the digital television transition.

If the Commission determines to reallocate channel 16 to public safety communications, Tribune advocates that it be permitted "to maximize (its) future DTV facility on channel 17 without regard to channel 16 land mobile stations and with the

⁶ Mullaney's contention that parties to the W11BJ displacement application were not served with the Department's December 5, 2003 Report to the Commission is incorrect. A copy was filed in the record relating to Application BPTV-19980601QZ and all parties to the proceeding received a copy. *See* Letter of John E. Logan, Special Counsel to the Police Department of the City of New York, to Ms. Marlene Dortch, Secretary of the Commission, dated December 10, 2002, and received by the Commission's Secretary on December 10, 2002.

need... to seek waiver of the Commission's rules with respect to protection of such TV channel 16 land mobile operations."

Tribune, without defining what it means by "maximizing", seemingly seeks more than its current status. Its current operations do not present interference circumstances with channel 16 public safety communications in the New York Metropolitan area. It should be given no authority to "maximize" its operations to the detriment of public safety in the New York Metropolitan area when it moves to digital. Notably the Desired to Undesired Signal Ratio (D/U for digital television is significantly less than that required for the current NTSC.⁷ Moreover, the Department and NYMAC believe that the digital environment provides a more compatible format with land mobile operations because of its more uniform noise like character than the two peaked (video and sound carriers) spectral NTSC format.

Tribune relates circumstances where the provision of public safety communications have been allowed outside of established allocations. Tribune complains of the migration of public safety communications to the detriment of broadcast interests.

Yet, Tribune does not relate how channel 16 current or future public safety operations in the New York Metropolitan area will encroach on other services. Neither the Department nor NYMAC seek to expand channel 16's coverage area, in fact the coverage area of channel 16 has been reduced. What does appear is its sincere advocacy on behalf of broadcasts interests. It seeks to further this interest and proposes that channels 16 be turned back to broadcasters 90/180 days after the end of the digital

⁷ In the Matter of Advanced Television Systems and Their Impact Upon the Existing Broadcast Service, *Report and Order*, Sixth Report and Order, page A2 Adjacent channel D/Uratios (April 21, 1997).

television transition. Tribune's flash cut of public safety operations is neither sound public policy under the Communications Act of 1934, as amended, nor a realistic proposal.⁸

The enormous operational burden and economic costs of abandoning public safety operations on channel 16 within a 90 or 180 time period contradicts the transition broadcasters themselves have been afforded. Moreover, determining when the digital transition will be completed remains a speculative endeavor which the broadcast interests are not at the forefront of resolving. More fundamentally, there is no basis to conclude that there is any spectrum to move to. Contentions that the 700 MHz allocations will provided the needed relief to New York area public safety communications ignore the enormous challenge facing such communications in the post September 11, 2001 environment, particularly in the in the New York Metropolitan area. The Department and NYMAC urge the Commission to determine that the most valuable use of channel 16 in the New York Metropolitan area is for public safety communications.

Comments of K Licensee

K Licensee is the licensee of WEBR (CA) 17, a Class A low power television station with facilities transmitting a signal from the Empire State Building in the northeast direction. K Licensee relates a number of complaints and statements-- that the Commission has denied it due process, that its process rights under the Administrative Procedure Act have been violated, that NYMAC has "grossly mislead" the Commission, that the New York City Police Department acted in "totally bad faith", that spectral efficient efforts have not been pursued by the New York Metropolitan public safety

⁸ Any debate over competing interests must reflect section 1 of the Communications Act of 1934, as amended, which states that the purpose of promoting safety of life and property is joined by promoting the

agencies, that there is no justification for the assignment of public safety frequencies, particularly those relating to mission critical response capability involving terrorist activities, that the Commission's interpretation of section 337(c) is incorrect. K Licensee adds that it has not had meaningful opportunity to participate and has commented on only some of the issues raised in the NPRM.

K Licensee's contentions that it has not been provided an adequate opportunity to comment and it purported mistreatment by the Commission and the New York Metropolitan area public safety agencies must be rejected. The Commission released the NPRM on July 10, 2003. The NPRM appeared in the Federal Register on August 22, 2003, establishing an initial comment date of September 22, 2003. Additionally, contrary to K Licensee's statement that it did not receive a copy of the Department's report to the Commission either before or after it was filed, a copy was forwarded to it and its counsel on May 16, 2003.⁹ Moreover, K Licensee admits that it was advised in August 2002 of the Department's intention to seek permanent authority.¹⁰ Any fair reading of the NPRM indicates that it presents the necessary issues for interested parties to examine and respond to. K Licensee's assertions that it did not have opportunity to respond cannot stand.

From raising procedural challenges to the Commission's processes, K Licensee challenges a critical element of the Commission's proposal and the primary purpose for which the Department submitted its request--there is a fundamental need to provide public safety adequate spectrum in the New York Metropolitan area. K Licensee states

national defense as the preeminent objectives of the Nation's telecommunications policies.

⁹ See Letter of Cornelius C. Walsh, Lieutenant, Police Department of the City of New York, to K Licensee, Inc., dated May 16, 2003, and provided to the Media Bureau of the Commission on May 21, 2003.

¹⁰ Comments of K Licensee at page 7, paragraph 3.

that “there is no evidence that the proposals are driven or justified by an urgent need for additional mission-critical frequencies to respond to terrorist acts. To support its contention, K Licensee references a report prepared by McKinsey & Co (“McKinsey”), which in 2002 released an extensive examination of the September 11, 2001 attack and the emergency response of public safety.

K Licensee provides an excerpt from the McKinsey report which relates the communications capability of the Department and how it functioned on September 11, 2001. It emphasizes how effectively the Department’s communications system operated on September 11, 2001. That McKinsey was able to make this statement emanates originally from the Commission’s assignment of channel 16 on a temporary basis, as channel 16 is a critical element in the Department’s communications infrastructure. The investment by the City of New York in infrastructure supporting channel 16, with its redundancy and diversity, in training its officers and personnel, and in maintaining it is a credit to government at the local and federal level. The Commission’s assignment and the Department’s investment provided wireless communications to support a public safety response to the most extreme of emergencies, the September 11, 2001 attack on the World Trade Center. Instead of challenging the need to allocate permanently channel 16 to public safety as K Licensee contends, the McKinsey report is an emphatic embrace of the need for it.

More disturbing than its distorted reading of the McKinsey Report’s review of Department communications on September 11, 2001, is K Licensee’s failure to examine the report’s review of the challenges experienced by the Fire Department communications systems on that day. The report states that there is an urgent need to

improve the Fire Department's communications capabilities in terms of reliability and quality, with particular emphasis on the high rise building environment. Indeed, the McKinsey report recommends improvements in the infrastructure supporting wireless communications and in interoperability links to other agencies, including the Fire Department.¹¹ It is McKinsey that suggests the \$250 million investment K Licensee refers to. Channel 16 is at the heart of these current efforts to bring about improved communications capability to the City's firefighters, emergency medical technicians and paramedics, the most significant of which is obtaining permanent authority from the Commission. These improvements rely on the Commission's grant of permanent authority for channel 16. Ultimately, K Licensee's claim that no such need exists distorts the findings of the very report that it cites and flies directly in the face of the findings of the companion report that it does not cite.

K Licensee's claim that no need exists to provide channel 16 on a permanent basis is not only contrary to the vast evidence contained in the very report K Licensee cites. It reflects a disconnection to the fundamental capability that is now at the center of channel 16 in the New York Metropolitan area, and how, as a result of the September 11, 2001 attack, channel 16's capability must be protected and reinforced.

K Licensee also claims that the Department has failed to demonstrate that no other spectrum allocated to public safety services is available, as required under section 337(c)(1)(A) of the Communications Act, is available. It ignores the Technical Report prepared by the Vogel Consulting Group, Inc. that examined each public safety frequency band. K Licensee presents no information challenging this evidence which demonstrates

¹¹ McKinsey Report, *Improving FDNY's Preparedness*, [www.
http://nyc.gov/html/fdny/html/mck_report/toc.shtml](http://nyc.gov/html/fdny/html/mck_report/toc.shtml) (visited October 5, 2003)

the extreme circumstances public safety communications face in the New York Metropolitan area and the lack of accessible spectrum. The reality is that there are no frequencies available to meet the Department and NYMAC's needs in the spectrum bands allocated to public safety communications. .

K Licensee challenges the Department and NYMAC's examination that no harmful interference will accrue from permanent authorization, a requirement under Section 337(c)(1)(B) and refers to its analysis as suspect. Experience reflects clearly the commitment of the Department's and NYMAC's resources to ensure the continued coexistence of broadcast and land mobile services.

Specifically, K Licensee claims that:

*The technical conclusions in the NYMAC report are suspect. For example, Vogel's analysis concludes that police radio coverage is only 35 percent of what it could be with WEBR(CA) off the air at the study site location. However the report previously notes that detailed measurements are required to confirm that 35 percent figure. Thus what was made as a statement of fact in one part of the NYMAC report is actually only a projection.*¹²

However, K Licensee ignores that the Vogel report clearly "concludes" that:

The **preliminary measurements** indicate that there is a severe reduction in coverage area of the NYPD site at the impacted site of frequencies that are in use. Should the levels be confirmed by further measurements, continued degradation of the noise floor by interference may lead to severe consequences when coverage and capacity is strained in an emergency.¹³ Emphasis added.

Consequently K Licensee's contention that: "The technical conclusions in the NYMAC report are suspect." is specious. The measurement that was reported has been

¹² Comments of K Licensee at page 10, paragraph 2.

¹³ Vogel report at page 35, **PRELIMINARY MEASUREMENT CONCLUSION**

made, and is a valid measurement. It has been made at only one site, and at a limited number of frequencies. Thus it is preliminary as stated, and may in fact be worse than the preliminary measurement reported.

K Licensee further states:

[T]he noise floor that NYMAC is seeking to establish as a standard is -123 dBm or 0.14 uv (sic) into a 50 ohm receiver. In reality, the urban environment of New York City makes this level of performance unattainable given existing interference sources.¹⁴

In reality, nowhere has the Department or NYMAC stated that it seeks to establish a standard. However, such receivers are used in the downtown Chicago, Illinois area, and with careful system design, are able to operate with such sensitivity. Thus, it is not out of the question that such receivers would be able to attain -123 dBm sensitivity at some sites in NY City with careful planning and without purposefully placing high out of band noise sources nearby. This is the point of the Technical Report, broadcast and land mobile service operations co-exist in the New York Metropolitan area and can coexist in the future. Additionally, the Technical Report makes the important point that land mobile operations on channel 16 will face severe challenges if K Licensee is able to raise its power levels or alter its contour. Contrary to K Licensee's assertions, the Technical Report is not suspect; it adequately and accurately comprehends the environment facing land mobile and broadcast services presently and in the future. It does not seek to narrow K Licensee's current operations.

In addition, the Department's request sought to bring clarity to K Licensee's operations and the public safety communications on channel 16. Significantly, there is a difference between the Commission's record as to what parameters K Licensee is

authorized to operate under and its actual operations. Specifically, the ERP and other technical details obtained from K Licensee's engineering consultant are contrary to technical information obtained from the Commission's public access web site and the license issued to K Licensee. The Commission shows K Licensee's ERP to be 2.0 kW, not 1.07kW, and the polarization to be horizontal. Additionally, the horizontal antenna pattern is different as is the antenna model number. K Licensee has not addressed these issues in the past or in its Comments.

K Licensee next contends that the Department and NYMAC have failed to show under Section 337(c)(1)(C) that its use is consistent with existing public safety allocations. K Licensee asserts that the Department proposes expanded use of a channel 16 guard band-- "unassigned frequencies were in fact in use by NYMAC agencies as a guard band between channel 16/17 at the time of the conditional waiver." There is no guard band in channel 16 frequencies, the entire channel is assigned. Moreover at the time of the conditional waiver, there was no authority to use channel 16. Public safety operations have existed for several years, without interference to other services. Significantly, the Commission notes the Department's commitment to maintain the status quo with regard to the relationship with K Licensee, and the Department and NYMAC reiterate this premise here.¹⁵

In this regard, the relationship between the Department and NYMAC has been governed by a Memorandum of Understanding (MOU) executed during the Commission's implementation of legislation providing Class A status for low power television stations in 2000. During the course of that proceeding the Department

¹⁴ Comments of K Licensee at page 10, paragraph 2.

¹⁵ NPRM at para 9.

advocated that any grant of Class A status must not confer any ability to expand current low power television operations to the detriment of channel 16's public safety operations. The Commission agreed with this premise and encouraged the parties to enter into a MOU. The MOU outlines the commitment of both parties to coexist by establishing procedures to allow interested parties to examine proposed changes in operations. The MOU was integrated into the Commission's Order addressing Class A low power television stations.¹⁶ The Department and NYMAC fully expected to maintain the MOU once channel 16 became permanent.

In its Comment K Licensee announces a unilateral termination of the MOU, contending that it is only relevant to a displacement application it had submitted to the Mass Media Bureau, an application that was denied on August 19, 2002. Despite there being no reference to any displacement proceeding in the MOU, that it was executed in the context of the Commission proceeding addressing Class A television stations and the Department's concern that channel 16 operations be protected, and despite K Licensee attending a meeting subsequent to its denial of its displacement application and called pursuant to the MOU regarding the Department seeking the permanent allocation of channel 16, K Licensee now claims it is not bound by it. Beyond that the agreement reflects the understanding of the parties as to how two services, broadcast and land mobile, can coexist, it was adopted in the Commission's rulemaking and cannot be unilaterally terminated. That K Licensee is stepping back from its obligation under the agreement reiterates the Department's premise for the need for the Commission to make a permanent assignment of channel 16 to public safety communications in the New York

¹⁶ In the Matter of the Establishment of Class A Television Service, *Report and Order*, MM Docket No. 00-10, MM Docket 99-292, RM-9260 at para 82 (April 4, 2002).

Metropolitan area. Contrary to K Licensee's assertion, all the provisions of section 337 have been met.

K Licensee makes other two assertions. The first is to challenge the Commission's authority to allocate channel 16 on a permanent basis pursuant to Section 303 of the Communications Act.¹⁷ Section 303 encompasses the historic and plenary powers of the Commission to regulate and manage the radio spectrum. There can be no credible question that somehow section 337 deletes or undermines this authority in any way. Moreover, the Commission carefully examined the interplay between Section 303 and 337, and properly concluded that the Department had met the standards of each.

K Licensee's additional assertion is that any decision by the Commission to allocate channel 16 on a permanent basis must be preceded by examining whether efforts by public safety agencies in the New York Metropolitan area to pursue spectrum efficiency have been adequate. It restates its contention that the spectrum is not needed. K Licensee ignores that the Commission has a long pending proceeding regarding spectrum efficiency of land mobile operations, a proceeding requiring land mobile users to transition to more efficient spectrum. It ignores the reality that the Department and NYMAC examine spectrum efficiency as one element of acquiring technology that is proven reliable in the public safety environment. Any attempt to somehow join this NPRM with that relating to spectrum efficiency, serves no purpose other than to delay critical improvements to public safety operations in the New York Metropolitan area.

Despite K Licensee's invectives characterizing the Commission, the Department, and NYMAC, despite its position that channel 16 is not necessary for critical homeland security communications, and despite its opposition to providing the New York

Metropolitan area's public safety agencies permanent authority to continue the investment in channel 16, the Department and NYMAC respect the legitimacy of K Licensee's concern regarding its own broadcast operations. The Department and NYMAC commit to providing interested parties the technical information it has, if the Commission believes such will further the expeditious resolution of this matter.

However, as the Department has made clear to K Licensee¹⁸, it will only provide access to such information under a Commission established process. At stake is information that goes to the integrity of the public safety communications network. Notably, elements of these facilities were lost in the September 11, 2003 attack. In contrast to any private process, only the Commission's procedures encompasses the expertise and resources, both substantive policy and enforcement, relating to regulating the telecommunications sector. The Commission has the ability to ensure that this information is safeguarded by making those licensed by it directly accountable for any unauthorized release.

Comments of Catholic Views

CVB relates¹⁹ concern regarding the technical elements of channel 16 operations and seeks additional information. Consistent with the Department position noted above, it has no objection to CVB being afforded this opportunity.

¹⁷ Comments of K Licensee at page 12, paras 1-2.

¹⁸ See Letter of Cornelius Walsh, Lieutenant, Police Department of the City of New York, to Julian L. Shepard, Counsel to K Licensee, contained in K Licensee's attachment

¹⁹ The Department and NYMAC have no objection to the Commission accepting CVB's September 23, 2003 Comments

Conclusion

At stake in this proceeding is affording public safety agencies in the New York Metropolitan area the ability to make needed improvements in the wireless communications that channel 16 so critically supports. There should be no doubt that delay will cause tangible harm in the effort to improve public safety communications in the New York Metropolitan area. The Comments filed by Mullaney, Tribune and K Licensee demonstrate the critical need for the Commission to allocate permanently channel 16 in the New York Metropolitan area to public safety communications; the

opposing comments reflect the pursuit of valuable spectrum and how conflicts will inevitably surface and cause immeasurable delays unless the Commission acts. Channel 16's current operations coexist with other services and under the Commission's proposal will continue to do so. The Commission should act positively and expeditiously on its proposal to allocate channel 16 to the public safety operations.

Respectfully submitted,

Police Department of the City of New York

John F. Gilmartin
Deputy Chief and Commanding Officer
Office of Technology and Systems Development

Cornelius Walsh
Lieutenant
Office of Technology and Systems Development
Police Department of the City of New York
1 Police Plaza
New York, New York 10038
646.610.8969

Vincent R. Stile
Chairman, New York Metropolitan Advisory
Committee
c/o Suffolk County Police Department
30 Yaphank Avenue
Yaphank, New York 11980
631.852.6431

John E. Logan
Special Counsel to the
Police Department of the City of New York
1050 Connecticut Avenue, NW
Tenth Floor
Washington, D.C. 20036
202.772.1981

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